Filed 5/5/06 In re S.D. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.D. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. D.N., Defendant and Appellant.	E038804 (Super.Ct.No. J094897) OPINION

APPEAL from the Superior Court of Riverside County. Robert M. Padia, Judge. Reversed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Jacquelyn E. Gentry, under appointment by the Court of Appeal, for Minor S.D.

Sharon M. Jones, under appointment by the Court of Appeal, for Minors An.M. and Aa.M.

D.N. (mother) appeals from an order terminating her parental rights to S.D. (age four), and establishing a permanent plan of long-term foster care for An.M. (age nine) and Aa.M. (age six).[1] She contends that the court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and that it abused its discretion by failing to order a sibling bonding study before ordering a permanent plan of long-term foster care with a relative for the two older children and adoption by a nonrelative for S.D.

We find no abuse of discretion with respect to the requested bonding study. However, we will reverse the order terminating the mother's parental rights to S.D. and establishing a permanent plan of long-term foster care for An.M. and Aa.M., and order the court to comply with ICWA's notice requirements.

FACTUAL AND PROCEDURAL HISTORY

The issues raised in this appeal do not require an extensive discussion of the facts underlying the dependency and the decision to terminate parental rights. Additional facts will be stated as pertinent to the issues raised on appeal.

Stated briefly, the history of this case is as follows:

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[1] The children's fathers are not parties to this appeal.

A dependency petition pursuant to Welfare and Institutions Code section 300[2] was filed as to all three children on June 18, 2003. The children came to the attention of the Department of Public Social Services (DPSS) on June 17, 2003, when their mother was arrested for making criminal threats. The youngest child, S.D., had been living with her father, M.D. for about a month. The mother and the two older children were homeless and the mother had no means of providing for them; moreover, as a result of her arrest, she was incarcerated at the Banning Correctional Facility. The mother did not know where An.M.'s and Aa.M.'s fathers could be contacted.

At the detention hearing, all three children were ordered detained from their mother's custody. S.D. was placed with her father pending the jurisdiction and disposition hearing. At the jurisdiction and disposition hearing, reunification services were ordered for the mother and for S.D.'s father. S.D. was later removed from her father's home.

Neither parent made more than minimal progress toward completion of their case plans, and services were ultimately terminated. An.M. and Aa.M. were found to be mildly to moderately retarded, and there were conflicting opinions as to whether S.D.

[2] All statutory citations are to the Welfare and Institutions Code, unless another code is specified.

was developmentally delayed.[3] An.M. and Aa.M. were placed with a maternal great-aunt, while S.D. was placed in a nonrelative foster home.

At a section 366.26 hearing, the court ordered a "planned permanent living arrangement" as the permanent plan for An.M. and Aa.M.[4] The court found S.D. adoptable and that adoption was in her best interest. It terminated parental rights as to S.D. and ordered DPSS to refer her to its licensed adoption agency for adoptive placement.

The children's mother filed a timely notice of appeal.

DISCUSSION

ICWA Compliance

The mother contends that there is insufficient evidence that DPSS complied with the notice requirements of ICWA. She points out that DPSS was informed that she had Cherokee heritage and that S.D.'s father had Apache heritage. However, although the social worker's reports state that she "noticed" "all Cherokee tribes" and "all Apache tribes," neither the notices she sent nor the replies she stated she received from "the

[3] There is no indication in the record that any evaluation was conducted to determine the existence or extent of any such delay.

[4] We assume this means long-term foster care. (See § 366.26, subd. (b) [permanent plan options are adoption, legal guardianship and long-term foster care].)

Apache tribes" are included in the record.[5] The mother also points out that the juvenile court did not make the required finding that ICWA did or did not apply.

ICWA provides that when a child subject to a dependency proceeding is or may be of Native American heritage (referred to in ICWA as an "Indian child"), each tribe of which the child may be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. (25 U.S.C. § 1912(a).) An "Indian child" for purposes of ICWA is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U. S.C. § 1903(4).) "Determination of [a child's] tribal membership or eligibility for membership is made exclusively by the tribe." (Cal. Rules of Court, rule 1439(g).) If proper notice is not given, the child, the parent, or the tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914.)

Neither the child nor the parents need to be enrolled members of a tribe to trigger ICWA notice requirements. (See *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.) Instead, notice must be given when the court "knows or has reason to know that an Indian child is involved . . . ." (25 U.S.C. § 1912(a).) A parent's suggestion that the child "might" be of Native American ancestry is enough to trigger the notice

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[5] In response to our order granting the mother's motion to augment the record to include the notices and the responses, the clerk of the juvenile court provided a certificate stating that no such documents are contained in the juvenile court's file.

requirement. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) The information supplied by the mother in this case was thus sufficient to trigger ICWA's notice requirement.

To comply with the notice requirement, the social services agency must notify the child's tribe, by registered mail with return receipt requested, of the pending proceedings and of its right to intervene. (25 U.S.C. § 1912(a).) If there is more than one possible tribal affiliation, the agency must provide notice to each tribe through the tribe's chairperson or its designated agent for service of process, as published in the Federal Register. (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1213.) The notice must include all required information, including the child's name, date of birth, and place of birth; the name of the tribe or tribes in which the child is enrolled or in which the child may be eligible for enrollment; the names, and current and former addresses, of the child's biological parents, grandparents and great-grandparents, along with the birth dates, places of birth and death, and tribal enrollment numbers, and/or other identifying information; and a copy of the petition, complaint or other document by which the proceeding was initiated. (25 C.F.R. § 23.11(a), (d) & (e) (2005); see also Cal. Rules of Court, rule 1439(f).) Because the failure to give proper notice forecloses participation by interested Indian tribes, ICWA notice requirements are strictly construed, and strict compliance is required. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475.) Accordingly, rule 1439(f) of the California Rules of Court requires the social services agency to file with the court copies of all notices it sent, the return receipts, and any response it received

from the tribe or tribes. (See also *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703-704; *In re Asia L.* (2003) 107 Cal.App.4th 498, 507-509 [court cannot make knowing finding as to applicability of ICWA without evidence that notice was given in compliance with ICWA requirements].)

Here, the only evidence contained in the record on appeal consists of the social worker's statements in her reports that she noticed all Cherokee and Apache tribes and that she received responses from the Apache tribes indicating that they had no record of the children and would not intervene. These bare assertions are not sufficient evidence to support a finding that notice was given as required by law: There is no evidence that the notices contained all of the required information, that they were mailed to the correct entities and to the correct addresses, or that they were actually received by *all* of the tribes which had a potential interest in the children. ICWA and all cases applying it "unequivocally require *actual notice* to the tribe of both the proceedings *and of the right to intervene*." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) The record also does not reflect that the juvenile court made any finding as to the applicability of ICWA or the sufficiency of the notices: None of the minute orders and none of the transcribed proceedings which constitute the record on appeal contain any reference to ICWA whatsoever.

Accordingly, we will reverse the order terminating mother's parental rights to S.D. and establishing a permanent plan of long-term foster care for An.M. and Aa.M., and

remand this matter to the trial court with directions to order DPSS to comply with ICWA notice requirements and to comply with all applicable state and federal laws and rules.

Failure to Order a Sibling Bonding Study

The mother also contends that the juvenile court abused its discretion by denying her request for a sibling bonding study before terminating her parental rights to S.D.

Adoption is the permanent plan preferred by the Legislature. If the juvenile court finds that a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child under one of five exceptions specified in section 366.26. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) One such exception is the sibling relationship benefit exception. To determine that this exception applies, the court must find that adoption would cause substantial interference in the sibling relationship and that the nature of the sibling relationship is such that ongoing contact is in the child's best interest as compared to the benefit of legal permanence through adoption. (§ 366.26, subd. (c)(1)(E).) The party asserting the exception has the burden of proving its predicate facts. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1119-1120; *In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 951-953.)

Although a court certainly may order a sibling bonding study, as the mother requested in this case, the decision is a matter of discretion. (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197; see also *In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1018.)

And, when the study is requested only late in the proceedings, as in this case,[6] denial of a request for a bonding study is an abuse of discretion only if there are "compelling circumstances." (*In re Richard C.*, *supra*, at p. 1197.) Thus, mother bears the burden on appeal of demonstrating that in light of compelling circumstances, the court's failure to order a bonding study was an abuse of discretion, i.e., that it was arbitrary, capricious or patently absurd, or that it exceeded the bounds of reason. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Mother asserts that the juvenile court abused its discretion because there was a paucity of information in the record concerning the nature and quality of the sibling relationship. Because the children had limited expressive abilities, she asserts that a bonding study was necessary to determine the extent to which the children were bonded and the extent to which S.D. would be negatively affected by the interference with any such bond resulting from her adoption. However, mother does not explain why these circumstances are so "compelling" as to render the denial of the request an abuse of discretion and has therefore not met her burden of demonstrating an abuse of discretion. Moreover, she fails to address the threshold issue: whether the adoption would cause "substantial interference" in the sibling relationship. (§ 366.26, subd. (c)(1)(E).) In the absence of any evidence that the adoption would substantially interfere with S.D.'s

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[6] The mother requested a bonding study four months after the case had first been set for a permanency planning and implementation hearing pursuant to section 366.26.

relationship with her siblings, there is no need to assess the strength of the bond or the effect that disruption would have on S.D.'s emotional well-being.

S.D.'s prospective adoptive mother stated that she would maintain visitation between the siblings, and she provided her telephone number to the older children's foster mother in order to facilitate visitation. The foster mother did not expressly state that she would facilitate visitation, but she did tell the social worker that she wanted all three children placed with her. Her concerns about having S.D. placed elsewhere were apparently mollified by the information that S.D.'s prospective adoptive mother wanted to maintain the children's relationship. This supports the inference that she, too, would facilitate visitation in order to maintain the children's bond. Further, the court referred the matter to mediation for a "post adoption contact contract with the siblings." There is no evidence that the children's bond cannot be maintained through visitation, and the record thus supports the conclusion that the adoption would not substantially interfere with the sibling relationship. Accordingly, it was not an abuse of discretion to deny the request for a bonding study.

DISPOSITION

The orders terminating the mother's parental rights to S.D. and placing An.M. and Aa.M. in long-term foster care are reversed. The juvenile court is directed to order DPSS to give notice in compliance with ICWA. If, after 60 days after sending notice, no determinative response is received, the court shall determine that ICWA does not apply and shall reinstate the original orders. (Cal. Rules of Court, rule 1439(f)(6).) If a

determinative response is received within 60 days, the court shall proceed in accordance with that response -- if it is determined that the children are not Indian children, then the order terminating parental rights shall be reinstated; if it is determined that the children are Indian children, the court shall set a new section 366.26 hearing which shall be conducted in accordance with ICWA and all pertinent state and federal laws and rules.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.